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Notes

- 1 Available in Spanish at: www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_002_2015_CLC/Res002-2015-%20CLC.pdf.
- 2 Available in Spanish at: http://indecopi.gob.pe/RepositorioAPS/0/2/par/ABOG_001_2014_ST_CLC/ABOG_001_2014_ST_CLC.pdf.
- 3 Available in Spanish at: www.osiptel.gob.pe/repositorioaps/data/1/1/1/PAR/exp010-2013-cc/Res023-2015-CCO-Exp003-2013.pdf.

Unannounced inspections conducted by FAS Russia on the basis of anonymous complaints are unlawful

On 30 April 2015, the Federal Arbitration Court of the Moscow district ruled on the disputed case in relation to the unannounced inspections that the Federal Antimonopoly Service (FAS Russia) carried out in the market for liquid caustic soda.

At the end of 2011, FAS Russia accused chemical companies OJSC Galopolymer and LLC Galopolymer Kirovo-Thcepetsk of violation of Part 1 Article 11 of the Federal Law ‘On Protection of Competition’ as of 26 July 2006 No 135-FZ (the ‘Competition Law’) and in particular for creating and operating a cartel in the period from 2005 to 2011. After investigating the case, FAS Russia established that the companies had concluded an anti-competitive agreement fixing prices and sharing the market for wholesale supplies of liquid caustic soda.

The evidence for establishing that there was a cartel was received by the antimonopoly authority during unannounced inspections that were carried out on the basis of anonymous emails sent to it. On 3 February 2011, two emails (No 0744 and 0745) were sent to FAS Russia from two rather strange email accounts (brynkinruslan@rambler.ru and cherenkovvalida@rambler.ru) belonging to unidentified persons living in non-existent addresses in Moscow. No actual information was provided in the emails in relation to the violation committed on the market for liquid caustic soda. The emails just indicated that these two companies had probably breached the Competition Law but did not provide any evidence or more specific information regarding the alleged violations.

Despite the anonymous and doubtful nature of the emails, FAS Russia carried out a number of unannounced inspections at the premises of producers and sellers of caustic soda based on those emails.

Therefore, OJSC Galopolymer and LLC Galopolymer Kirovo-Thcepetsk filed a claim with the court on the grounds that unannounced inspections are unlawful if they are conducted on the basis of anonymous information. During its inspections, FAS Russia received documents that were further used in proceedings against the two companies regarding their participation in a cartel on the market for liquid caustic soda.

Upon the request of the court, JSC Rambler Internet Holding – via which the email accounts were created – replied that the accounts were created on the same day with a time difference of a few minutes and from the same IP address 194.88.252.142, and that the emails were sent a few minutes later to the authority.

Galopolymer considered that the fact that the email accounts were created from the same IP address indicated that there was only one person who wrote to FAS Russia from these two email accounts. In addition, the fact that the email accounts belonged to persons whose addresses did not exist in Moscow pointed to the fabricated nature of the emails.

Additionally, Galopolymer considered that the officials of the antimonopoly authorities wrote those emails themselves, as without those emails they would have no legal grounds to carry out unannounced inspections and, therefore, that was the only

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way for them to find a legitimate basis to conduct their inspections on the market for liquid caustic soda.

Galopolymer considered that that was the case because the IP address 194.88.252.142 was assigned to the internet service provider of FAS Russia, JSC OPK-Tel, which was located in one of FAS Russia's buildings and in the period between 2010 and 2012 offered internet services to the authority.

The courts found that the anonymous emails were indeed sent from the same IP address and from accounts belonging to people living in non-existent addresses in Moscow. Further, the courts found that the two email accounts were created on the same day with a time difference of a few minutes.

The courts ruled that Russian legislation allows the antimonopoly authority to conduct inspections on the basis of information received by email, but only if that email contains sufficient information for the identification of the sender. The general conclusion is that in order to carry out unannounced inspections, FAS Russia has to be able to prove that the information it has

received by email/message relating to the existence of a violation complies with the requirements of the law; otherwise, the unannounced inspections will be declared illegal.

In this case, the courts ruled that the inspections had been conducted in violation of the above-mentioned principles which automatically led to the results of the inspections being invalid.

The case was heard by three courts: the first instance court, that is, the Moscow Arbitration Court; the second (appellate) instance court, that is, the Ninth Arbitration Appellate Court; and the third instance (cassation) court, that is, the Federal Arbitration Court of Moscow. The case was upheld in all three instances.¹

Note

- 1 See: https://kad.arbitr.ru/PdfDocument/5519b274-39d3-453d-8dbe-d9b8c28cb996/A40-161484-2012_20150120_Postanovlenie%20apelljacji.pdf; https://kad.arbitr.ru/PdfDocument/6c60f40c-fde9-47a4-99b3-2b185ddb62f4/A40-161484-2012_20150430_Reshenija%20i%20postanovlenija.pdf; and www.vedomosti.ru/economics/articles/2015/05/13/fas-ne-smozhet-provodit-proverki-po-anonimkam.